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Margaret Elizabeth Chastain

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I. TAX

A. Power to Consume

In a per curiam decision, the South Carolina Supreme Court adopted the order of the Richland County Court of Common Pleas, upholding the assessment of an estate tax deficiency against the estate of Charles M. Middlebrooks. The issue in *Harper v. South Carolina Tax Commission*[1] was whether the deceased possessed a general power of appointment over the entire corpus of a trust, thus causing it to be included in his gross estate for purposes of taxation. If the deceased's power to consume was limited to approved, ascertainable standards, only one-half of the trust assets would be included in the gross estate. This was held not to be the case.[2]

In 1965, Mrs. Lelia B. Middlebrooks, age eighty-five, purported to place in trust her rental properties, which comprised approximately ninety percent of her owned property. Her eighty-five year old husband, the deceased, was named trustee. Under the terms of the trust both were named co-beneficiaries for life, then the property was to pass to the survivor of the two for life. At the death of the survivor, the trust was to terminate, and its assets were to be distributed to various relatives. Further, if Mr. Middlebrooks were the survivor, he would be given a general power of appointment over one-half of the corpus; taxes were to be paid from the other half of the corpus which was not subject to the power of appointment.[3] The trust also contained an acknowledgment that the trust property was "accumulated largely through the efforts, direction, and cooperation of my beloved husband."[4] The trust was not recorded until 1967, after Mrs. Middle-

1. 267 S.C. 144, 226 S.E.2d 699 (1976).

2. *Id.* at 147, 226 S.E.2d at 701.

3. Record at 8-9. The purpose of this provision was to qualify the trust for the marital deduction. *Id.* at 13.

4. *Id.* at 7.

brooks had already made four transfers of trust assets in her own name.[5]

South Carolina has adopted, by reference, valuation of estate assets by federal estate tax laws.[6] Assets controlled by a general power of appointment are included in the gross estate of a deceased by section 2041(b) of the Internal Revenue Code. A power to consume is deemed a general power of appointment, and thus part of the gross estate, unless it "is limited by an ascertainable standard relating to the health, education, support or maintenance of the decedent."[7] The court in *Harper* reasoned that because South Carolina has incorporated the federal law on powers of appointment, the state's standards in defining such powers must be "at least as stringent at those prescribed by Federal law."[8]

> The proper concern is not with the definition under South Carolina law of a general power of appointment, but is rather with whether under South Carolina law, Mr. Middlebrooks possessed a right to invade the corpus of the aforementioned trust beyond the standard of support and maintenance fixed by the taxing statute.[9]

Because the lower court felt that the instrument was ambiguous as to whether or not the power to consume or invade[10] was broader than the standard prescribed in section 2041(b)(1), it examined and emphasized the circumstances surrounding the making of the instrument,[11] following the supreme court's mandate in *Shelley v. Shelley*[12] that an ambiguous instrument must be so construed as to carry out the intention of the maker. In interpreting the instrument, the court focused on the following circumstances.

First, and most important, the court found a "striking contrast"[13] between paragraphs two and three of the trust instru-

5. 267 S.C. at 149, 226 S.E.2d at 702. When Mrs. Middlebrooks died in 1969, her estate received a marital deduction for the trust assets. Brief for Appellants at 2.

6. S.C. CODE ANN. § 12-15-40 (1976).

7. I.R.C. § 2041(b)(1)(A).

8. 267 S.C. at 148, 226 S.E.2d at 701 (quoting Lehman v. United States, 448 F.2d 1318, 1319 (5th Cir. 1971)).

9. *Id.*

10. The court used the terms "power to consume" and "power to invade" interchangeably throughout its opinion.

11. 267 S.C. at 149, 226 S.E.2d at 701-02.

12. 248 S.C. 598, 137 S.E.2d 851 (1964).

13. 267 S.C. at 151, 226 S.E.2d at 703.

ment. Paragraph two gave the trustee, the deceased, the power to distribute income from the trust for "support and maintenance";[14] paragraph three empowered the trustee to invade the corpus for "maintenance and support or for any other expenses."[15] The lower court's decision was grounded primarily on the interpretation of the phrase "or any other expenses,"[16] found in paragraph three. The remaining three circumstances on which the court based its decision reflect how this phrase should be interpreted.

Plaintiffs advocated resolving the uncertainty of the phrase by relying on the rule of *ejusdem generis.*[17] They argued this rule limited the phrase "or any other expenses" to support and maintenance, "because there is no other language available to modify it grammatically, and thus give it meaning."[18] The plaintiffs further attempted to clarify the phrase by explaining that the settlor intended the income to be used first, and afterwards the principal to be used (1) for support and maintenance when the income proved to be insufficient, and (2) for extraordinary expenses.[19] In rejecting this interpretation, the court held that rules of construction are "subservient to the paramount consideration of determining what [she] meant by the terms used in [her trust]."[20] The court further noted that the application of the rule of *ejusdem generis* in this context is limited: strict adherence to the standard of support and maintenance is necessary to take the assets controlled by a power out of the gross estate.[21]

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14. *Id.* at 149, 226 S.E.2d at 701 (quoting Record at 7-8).

15. *Id.* at 148, 226 S.E.2d at 701 (quoting Record at 8).

16. *Id.* Although the court seemed to speak in terms of the ambiguity between paragraphs 2 and 3, it actually focused on the ambiguous meaning of "or any other expenses."

17. *Id.* at 150, 226 S.E.2d at 702. BLACK'S LAW DICTIONARY 608 (4th ed. rev. 1968) defines the doctrine of *ejusdem generis* as follows:

> In the construction of laws, wills, and other instruments, the "ejusdem generis rule" is, that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned.

18. Brief of Appellants at 7 (italics omitted).

19. *Id.* at 16.

20. 267 S.C. at 150, 226 S.E.2d at 702 (citing Rogers v. Rogers, 221 S.C. 360, 336, 70 S.E.2d 637, 640 (1952)).

21. Miller v. United States, 387 F.2d 866 (3d Cir. 1968). *See* Lehman v. United States, 448 F.2d 1318 (5th Cir. 1971); Peoples Trust Co. of Bergen County v. United States, 412 F.2d 1156 (3d Cir. 1969); Strite v. McGinnes, 330 F.2d 234 (3d Cir. 1964), *reh. denied,* 379 U.S. 910 (1964); Stafford v. United States, 236 F. Supp. 132 (E.D. Wis. 1964).

Second, the court gave "much weight" to the fact that "Mr. Middlebrooks was without question the first object of his wife's affections and bounty,"[22] evidenced by the express acknowledgment in the trust, the childlessness of the couple, and the gift to collateral relatives upon the termination of the trust.[23] It has been similarly held that the language of a trust is to be given a broad construction whenever the possessor of the general power is also the main object of the trust.[24]

Third, the lower court felt that the following circumstances in existence at the time of the creation of the trust were indicative of the settlor's intent not to limit the power to consume to only support and maintenance: (1) The advanced age (eighty-five years) of the couple, and (2) "the value of the assets placed in the trust as compared to her total worth."[25]

Lastly, Mrs. Middlebrooks' actions of waiting two years before recording the trust and, in the meantime, transferring trust assets in her own name were taken as signs that her true intent was not to limit the withdrawal power to support and maintenance. "If she did not intend to so limit herself, she certainly did not intend to limit her husband who was a co-beneficiary."[26]

B. Trial by Jury; A "New Business"

In *C. W. Matthews Contracting Co. v. South Carolina Tax Commission,*[27] the court held that a taxpayer has no right to a trial by jury for a determination of the propriety of his tax assessment. The court further ruled that in order for a taxpayer's alleged new business to carry its losses forward for three years, its status as a new business must be determined on the basis of its initial year of operation.[28]

In 1964, Matthews, a Georgia roadbuilding corporation, submitted bids for the construction of Highway I-20 in Richland County. On January 4, 1965, it began work on this job, which eventually lasted three years. Although it utilized the local labor force and bought equipment from local dealers, the project super-

22. 267 S.C. at 150, 226 S.E.2d at 702.

23. *Id.* at 150-51, 226 S.E.2d at 702.

24. Strite v. McGinnes, 330 F.2d 234 (3d Cir. 1964), *reh. denied,* 379 U.S. 910 (1964); *accord,* Moody v. Tedder, 16 S.C. 557 (1882).

25. 267 S.C. at 151, 226 S.E.2d at 703.

26. *Id.* at 150, 226 S.E.2d at 702.

27. ___ S.C. ___, 230 S.E.2d 223 (1976).

28. *Id.* at ___, 230 S.E.2d at 226.

visor lived in South Carolina only during the week. The company maintained a mobile office on the job site. Even though the I-20 job was the company's only work in South Carolina in 1965, it did submit bids for other contracts, and it continuously operated in South Carolina from 1965 to 1976.

Startup costs for the project were considerable. During its first three years of South Carolina operations, Matthews lost approximately $722,000. In 1969 and in 1970, Matthews took a deduction for the losses it had sustained in 1965, 1966, and 1967,[29] relying on section 65-259(12)(a) of the South Carolina Code.[30] When this deduction was disallowed by the Tax Commission, Matthews paid the assessed taxes and brought a recovery action.[31] At the trial, plaintiff's only witness, Robert E. Matthews, president of the firm, testified that it was the intent of the company officials in 1964 and 1965 to operate its business in South Carolina on a permanent basis.[32] The supreme court rejected the plaintiff's assignments of error and held as follows.

1. There is no right to a trial by jury in a statutory action to recover taxes.—Although the seventh amendment[33] proclaims the preservation of jury trials in common law actions, the right to trial by jury is not guaranteed in any state cases.[34] However, the South Carolina Constitution provides that "the right of trial by jury shall be preserved inviolate."[35] In arguing for a liberal construction of this provision, Matthews stated:

> It is the appellant's view that it is essential to the preservation of the basic rights and liberties of the citizens of this State that this provision of our Constitution be liberally construed to afford all parties the right to trial by jury where factual matters are in dispute unless there is a specific state prohibition, or the right clearly did not exist at common law.[36]

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29. *Id.* at ___, 230 S.E.2d at 224.

30. S.C. CODE ANN. § 65-259(12)(a) (1962) (current version at § 12-7-700(12)(a) (1976)).

31. *Id.* at § 12-47-210.

32. ___ S.C. at ___, 230 S.E.2d at 224-25.

33. U.S. CONST. amend. VII provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

34. 47 AM. JUR. 2d *Jury* § 9 (1969).

35. S.C. CONST. art. I, § 14.

36. Brief of Appellant at 7.

The court had previously interpreted this section as preserving the right to a jury trial in only two situations. First, when the right existed at the time of the adoption of the constitution, it is still in force.[37] This was not the case in *Matthews*.[38] Second, when there is a statutory proceeding in the nature of a common law action, the party has a right to a jury trial.[39] In *Matthews* it was disputed whether the right to recover taxes was by nature a common law action.

In denying the company's allegation that the suit at bar was a common law debt action, the court rested its decision on several grounds. First, the court relied on the Washington State case of *Dexter Horton Building Co. v. King County*.[40] *Dexter Horton* was persuasive because Washington has a similar constitutional provision and a similar recovery statute. The Washington court, in refusing a jury trial, held that a tax recovery suit is based on the equitable principle of constructive fraud, because taxes are in trust and the state cannot receive interest on delinquent taxes absent a statutory provision.[41] "The erroneous collection of taxes can be likened to breach of the duty to assess only that which is owed. The res of the trust is established by the requirement of earmarking the protected funds."[42] To further buttress its holding, the court in *Matthews* analogized South Carolina's position to that of the federal system. The court used the Supreme Court's ruling that there is no seventh amendment requirement that a plaintiff be provided a jury trial "in a statutory action to recover taxes allegedly unjustly collected"[43] to hold that South Carolina's due process requirement is similar to the federal requirement in this respect. To reach its conclusion that Matthews was not entitled to a jury trial, the court further relied on a ninth circuit case

37. ___ S.C. at ___, 230 S.E.2d at 225; *see* McGlohon v. Harlan, 254 S.C. 207, 174 S.E.2d 753 (1970); Richards v. City of Columbia, 227 S.C. 538, 88 S.E.2d 683 (1955); State v. Gibbes, 109 S.C. 135, 95 S.E. 346 (1918); Smith & Co. v. Bryce, 17 S.C. 538 (1882); Commissioners of New Town Cut v. Seabrook, 33 S.C.L. (2 Strob.) 560 (1846).

38. Brief of Respondent at 3; *see* ___ S.C. at ___, 230 S.E.2d at 225.

39. ___ S.C. at ___, 230 S.E.2d at 225.

40. 10 Wash.2d 186, 116 P.2d 507 (1941).

41. *Id.* The South Carolina Supreme Court has also held that there is no right to recover interest on taxes paid under protest without specific statutory authority. Colonial Life & Accident Ins. Co. v. South Carolina Tax Comm'n, 233 S.C. 129, 103 S.E.2d 908 (1958), *cited in* United States v. Livingston, 179 F. Supp. 9 (E.D.S.C. 1959).

42. Brief of Respondent at 4.

43. ___ S.C. at ___, 230 S.E.2d at 226 (citing Wickwire v. Reinecks, 275 U.S. 101 (1927)).

that held that a proceeding to recover taxes was not a common law debt action.[44]

2. Only evidence of the initial year of an alleged new business may be used to determine whether it was, in fact, a new business.—In determining whether Matthews established a new business within the meaning of section 65-259(12), the court adopted the following definition of "to establish": "to bring usually as permanent or with permanence in view."[45] Thus, although the court considered Matthews's intent to initiate a new business (as evidenced by Mr. Matthews's testimony) as relevant to show intent, it held that the post-1965 business activities were irrelevant because the company's status as a new business had to be determined on the basis of its initial year of operation. In other words, the determination of whether plaintiff had established a new business in 1965 had to be made at the beginning of 1966. The court felt that the legislature had intended this result in order to preserve both the fairness and workability of the statute.[46] "The luxury of hindsight is not present. If establishment need not occur until later years, a state of limbo would exist . . . which would render the statute completely unworkable."[47]

But even if the lower court had erred in refusing to admit evidence of post-1965 activities, the error was harmless, according to the court, because the evidence did not prove the establishment of a new business. It merely showed that Matthews was "pursuing its existing business."[48]

3. Evidence Matthews presented of its 1965 activities was not sufficient to show it intended to establish a new business.—"Considering the nature of the road-building business,"[49] the court believed that the plaintiff merely expanded its range of competition, rather than established a new business. As stated by the trial judge,

> it simply continued its existing business which is located in Marietta by undertaking a single job in Richland County. The only other activity in this State was some unsuccessful bidding

44. ___ S.C. at ___, 230 S.E.2d at 226 (citing Olshausen v. C.I.R., 273 F.2d 23 (9th Cir. 1959), *cert. denied*, 363 U.S. 820 (1960)).

45. ___ S.C. at ___, 230 S.E.2d at 226 (quoting WEBSTER'S THIRD INTERNATIONAL DICTIONARY 778 (1976)).

46. ___ S.C. at ___, 230 S.E.2d at 226-27.

47. Brief of Respondent at 8.

48. ___ S.C. at ___, 230 S.E.2d at 227.

49. *Id.*

> which, although it may raise a doubt, is not enough to bring the taxpayer within the terms of the statute. This bidding is itself preliminary in nature and leads to no connotation of permanence. The fact that the plaintiff did business here from January 4, 1965, until November 29, 1965 (the date Matthews filed domestication papers), without authorization also shows a lack of commitment here.[50]

The court also felt that a ruling in plaintiff's favor would violate both a statutory rule of construction and the intent of the legislature. While admitting that the interpretation of what is a new business within the meaning of the statute was ambiguous, the court recognized that "[t]he rule generally applicable in the construction of income tax statutes that ambiguities are to be resolved in favor of the taxpayer . . . does not apply in the construction of a statute authorizing deductions; rather, the ambiguity will be resolved against the taxpayer."[51] The court also emphasized the importance of the legislative intent "to encourage the establishment of new businesses and industries and thereby provide employment and ultimately additional revenue."[52] To hold that Matthews set up a new business in 1965 would put a resident business at a competitive disadvantage, according to the court, because a resident in similar circumstances would be merely extending its already established business.[53]

Apparently, intent to establish a new business in South Carolina is not sufficient to qualify a company for the § 65-259(12) deduction. The court based its holding on the legislative intent of protecting resident companies while simultaneously encouraging new business. It gave little weight to the evidence of the company's intent to establish a new business—the testimony of the executives and the intent evidenced by the domestication papers, both of which met the court's definition of "to establish." The court seemingly emphasizes "new business" rather than "to establish a new business." Its language indicates that it considers "new business" to mean a new line of business rather than a new place of business. However, such a holding could arguably be

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50. Record at 66.

51. 47 C.J.S. *Internal Revenue* § 230 (1946) (cited in Southern Soya Corp. of Cameron v. Wasson, 252 S.C. 484, 167 S.E.2d 311 (1969)).

52. ___ S.C. at ___, 230 S.E.2d at 227. *See* Chronicle Publishers, Inc. v. South Carolina Tax Comm'n, 244 S.C. 192, 194, 136 S.E.2d 261, 262 (1964).

53. ___ S.C. at ___, 230 S.E.2d at 227.

restricted to the facts of the instant and similar cases, since the court did consider the transient nature of the road construction industry.

C. *Apportionment*

In another tax case, the supreme court considered the constitutionality of a nonapportioned ad valorem property tax in light of the right to due process. No prior South Carolina decision had dealt with the issue of whether due process requires the apportionment of personal property taxes, nor had any statute authorized such an apportionment. Thus, in *Atkinson Dredging Co. v. Thomas*,[54] the court declared "that if the tax levied on Atkinson's equipment could not be constitutionally levied on a nonapportionment basis, it must fail. We are unaware of any case in which the Court has attempted to remedy a defect in the taxing statute by ordering an apportionment."[55] After careful scrutiny of all arguments, the court upheld the validity of the nonapportioned tax.

Atkinson was a Florida corporation in the business of dredging navigable waterways and maintained its principal place of business in Virginia. Pursuant to a contract with the United States Army Corps of Engineers, it began dredging operations in Charleston Harbor in September 1970. On December 31, 1970, its equipment was assessed by Charleston County for the 1971 tax year.[56] On February 5, 1971, plaintiff completed work on the project and removed its equipment from the county.[57] After paying the tax under protest, Atkinson sued for recovery of a portion of the money it had paid. In the suit, both parties stipulated that the equipment had a tax situs in Charleston County and that plaintiff paid property taxes on the same equipment in Virginia in 1971. The lower court upheld the county tax assessor's assessment of a non-apportioned tax.[58]

Atkinson's first assignment of error was that the due process provisions of both the federal and state constitutions[59] require

54. 266 S.C. 361, 223 S.E.2d 592 (1976).

55. *Id.* at 365, 223 S.E.2d at 594.

56. *Id.* at 363-64, 223 S.E.2d at 593. The assessment was pursuant to S.C. CODE ANN. § 12-37-900 (1976).

57. Record at 20.

58. 266 S.C. at 363, 223 S.E.2d at 593.

59. *Id.* at 364, 223 S.E.2d at 594. U.S. CONST. amend. XIV, § 1 provides in relevant

apportionment when property subject to an ad valorem tax is physically present within the taxing jurisdiction for only a portion of the taxable year. In examining the merits of this contention, the court relied on the standard set forth by the Supreme Court in *Wisconsin v. J.C. Penney Co.*:[60]

> That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return.[61]

The court discounted plaintiff's cases that used the *Penney* test to require apportionment of taxes when the property was within more than one jurisdiction in a taxable year because all of the cases involved issues of interstate commerce as well as issues of due process.[62] "These cases, however, are readily distinguishable from the instant case in that the items sought to be taxed consisted of equipment which were *per se* engaged in interstate commerce . . . . Atkinson does not contend any of its property was engaged in interstate commerce during the period its equipment was in the county."[63]

Atkinson, in effect, conceded that Charleston County met the *Penney* test of compliance with due process by stipulating

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part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

S.C. CONST. art. I, § 3 reads as follows: "The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws."

60. 311 U.S. 435 (1940), *reh. denied*, 312 U.S. 712 (1941).

61. *Id.* at 444.

62. *See* Braniff Airways, Inc. v. Nebraska State Board of Equalization & Assessment, 347 U.S. 590 (1954); Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169, *reh. denied*, 336 U.S. 928 (1949); Flying Tiger Line v. County of Los Angeles, 51 Cal. 2d 314, 333 P.2d 323 (1958); Slick Airways v. County of Los Angeles, 140 Cal. App. 2d 311, 295 P.2d 46 (1956); Billings Transfer Corp. v. County of Davidson, 276 N.C. 19, 170 S.E.2d 873 (1969).

63. 266 S.C. at 367, 223 S.E.2d at 595. In making this distinction of plaintiff's cases, the court rejected Atkinson's argument that "recent decisions . . . turn on the question of whether or not the taxpayer received benefits or protection from more than one state, not whether or not the taxpayer was engaged in interstate commerce. Engagement in interstate commerce is *per se* insignificant." Brief of Appellant at 17 (emphasis omitted).

Although Atkinson spoke generally in terms of its business being identical to one in interstate commerce (Brief of Appellant at 10), it did not except to the trial court's finding that it was not engaged in interstate commerce. Record at 69-70; Brief of Respondent at 304.

that it was afforded "opportunities, benefits and protections"[64] of the county and state. There was no showing that the tax on Atkinson's equipment " 'clearly results in, such flagrant and palpable inequality between the burden imposed and the benefit received, as to amount to the arbitrary taking of property without compensation,' "[65] such a showing being necessary for the tax to be held violative of due process. Although the county and state may have received more benefits than did Atkinson Dredging, this was held not sufficient to invalidate the tax.[66]

Atkinson's second assignment of error was that the court was estopped from taxing its property on a nonapportioned basis because a 1970 court order had required apportionment of Atkinson's property taxes under similar circumstances. (This order was not appealed.) In rejecting plaintiff's contention, the court based its decision on policy grounds and dictated that estoppel by judgment should be frugally applied in tax cases.[67] Quoting a Ninth Circuit case, the court stated:

> "[W]e conclude that the rule, as applied in tax litigation, is sufficiently elastic to permit of the balancing of conveniences and the weighing of other considerations as against that of desired repose [estoppel by judgment] . . . . Thus in tax controversies of this character, when courts undertake to bestow on either party a vested right in an erroneous decision of law, they are apt, by multiplying the issues, merely to add fuel to the controversy."[68]

II. WORKMEN'S COMPENSATION

A. Lump-Sum Payment

In *Ashley v. Ware Shoals Manufacturing Co.*,[69] the supreme court set forth the general rule that a lump-sum payment of a

64. 266 S.C. at 368, 223 S.E.2d at 595 (citing Record at 20).

65. 266 S.C. at 368, 223 S.E.2d at 596 (quoting Dane v. Jackson, 256 U.S. 589 (1921)); *accord,* Sanders v. Greater Greenville Sewer Dist., 211 S.C. 141, 44 S.E.2d 185 (1947).

66. 266 S.C. at 367-68, 223 S.E.2d at 595.

67. *Id.* at 371, 223 S.E.2d at 597. In basing its decision on policy grounds, the court disregarded both the county's allegation of factual differences between the two proceedings, *id.*, and Atkinson's argument that "[t]he law should triumph over policy considerations, such as administrative hardship, the possibility of congressional action and the hardship which might be caused a county by a court ruling that it has no right to collect an unconstitutional tax." Brief of Appellant at 7-8.

68. 266 S.C. at 371, 223 S.E.2d at 597 (quoting Henricksen v. Seward, 135 F.2d 986 (9th Cir. 1943)).

69. 210 S.C. 273, 42 S.E.2d 390 (1947).

workmen's compensation award will be allowed only in the unusual case that necessitates such form of payment in order to serve the best interests of the employee or his dependents.[70] Now the court has refined this rule by holding in *Woods v. Sumter Stress-Crete*[71] that the desire to pay off outstanding debts and invest the remaining sum does not constitute such an unusual case.

When Ernest Woods died in 1972 as a result of injuries received in the course of his employment with the defendant, Sumter Stress-Crete, the Industrial Commission awarded his widow and two minor children death benefits of $63.00 per week for 400 weeks, the sum not to exceed $25,000. A year later, Mrs. Woods, on behalf of herself and her children, applied for the payment of the award to be in lump-sum, rather than periodic, form. The Commission granted her request and the lower court affirmed.[72]

Section 42-9-300 of the Code of Laws of South Carolina authorizes the Commission to permit the lump-sum payment of benefits as follows:

> Whenever any weekly payment has been continued for not less than six weeks, the liability therefor may, in unusual cases, when the employee so requests and the Commission deems it to be to the best interest of the employee or his dependents, . . . be redeemed, in whole or in part, by the payment by the employer of a lump sum which shall be fixed by the Commission.[73]

The rationale behind this statute is grounded in the underlying principle of workmen's compensation: the protection of income. "Experience has taught that this income-protection is best accomplished through periodic income payments."[74] As noted by the court in *Ashley*:

> Undoubtedly it was intended that periodic payments should be the rule and lump-sum settlements the exception. The principle involved in the compensation acts is that the benefits received are a substitute for the wages of the injured employee, and with this theory in mind almost all of the legislative bodies of the

70. *Id.*

71. 266 S.C. 245, 222 S.E.2d 760 (1976).

72. *Id.* at 247, 222 S.E.2d at 760-61.

73. S.C. CODE ANN. § 42-9-300 (1976). *See also* 266 S.C. at 248, 222 S.E.2d at 761; Ashley v. Ware Shoals Mfg. Co., 210 S.C. at 280-82, 42 S.E.2d at 393-94; *accord,* Brown v. Plowden Co., 216 S.C. 114, 117, 57 S.E.2d 29, 30 (1949) (quoting Ashley v. Ware Shoals Mfg. Co.).

74. 266 S.C. at 247, 222 S.E.2d at 761.

> various States have provided for the payment of compensation in regular installments. The purpose of this method is to prevent an imprudent employee or dependent from wasting the means for his support and thereby becoming a burden upon society.[75]

Two procedural rules are of significance in a case involving an application for lump-sum payment. First, the burden of proving facts to justify such an award rests on the claimants.[76] Second, unlike the normal rule that the court must uphold the Commission's finding if any competent evidence supports it,[77] the court in a case involving an application for a lump-sum payment of benefits is "empowered to review the record and determine whether the action of the Commission constituted an abuse of discretion."[78] Because the claimants in *Woods* did not produce sufficient evidence to show that this was an appropriate case for a lump-sum award,[79] the court found that the Industrial Commission "abused its discretion" and, accordingly, reversed the Commission's decision.[80]

Mrs. Woods's first three reasons for requesting a lump-sum settlement involved indebtedness.[81] First, she wanted to pay the outstanding mortgage on the house inherited by her and her children jointly.[82] Second, she wished to repay two loans, one for house repairs and the other for automobile repairs, that she had obtained from finance companies.[83] Third, she desired to pay the

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75. 210 S.C. at 280, 42 S.E.2d at 393.

76. 266 S.C. at 248, 222 S.E.2d at 761; Ashley v. Ware Shoals Mfg. Co., 210 S.C. at 289, 42 S.E.2d at 397; *accord,* Brown v. Plowden Co., 216 S.C. at 118, 57 S.E.2d at 31.

77. *See, e.g.,* Lorick v. South Carolina Elec. & Gas Co., 245 S.C. 513, 518, 141 S.E.2d 662, 664 (1965); Jake v. Jones, 240 S.C. 574, 579, 126 S.E.2d 721, 722-23 (1962).

78. 226 S.C. at 248, 222 S.E.2d at 761 (quoting Ashley v. Ware Shoals Mfg. Co., 210 S.C. at 289, 42 S.E.2d at 397).

79. An appropriate case is an extraordinary, or unusual, one.

80. 266 S.C. at 248, 222 S.E.2d at 761.

81. *Id.* at 248-49, 222 S.E.2d at 761-62.

82. Counsel for plaintiff had argued that paying off a mortgage on the family home was not a mere desire to pay a debt; rather, it was a way of protecting the family's interest in the property and assuring them of a home. Brief of Respondents at 3. Counsel for the Commission countered by saying this contention was speculative only, but admitted that "[i]f the respondents were in danger of losing their home because of their inability to meet the mortgage payments on account of the death or disability of the family breadwinner, an unusual circumstance might exist within the meaning of the statute." Brief of Appellants at 7.

As to the question of whether a lump-sum payment will be granted for the purpose of paying the mortgage on a residence, *see generally* 99 C.J.S. *Workmen's Compensation* § 343 (1958) and cases cited therein.

83. Professor Larson has remarked that "it seems wrong to use lump sums to enable a claimant to pay past debts, although there is no lack of cases in which this purpose has

attorneys' fee for representation in this action.[84] Instead of examining each reason separately in order to determine whether it was "unusual,"[85] the court looked at the aggregate. After noting that all three debts were "being retired on a monthly basis,"[86] the court scrutinized the mathematics of the Woods's situation and found that the facts were not so unusual as to require a lump-sum award:[87] "The foregoing facts fail to present an exception to the general rule, adopted by this Court in *Ashley,* that 'the desire to pay debts is not regarded as a sufficient ground to justify commutation of compensation payments.' "[88]

Mrs. Woods's fourth basis for requesting a lump-sum award was her contention that she would profit, in terms of interest, by paying her debts and then investing the balance of the award in a local savings and loan company. The supreme court summarily disposed of this ground by holding that the alleged profit was not supported by facts in the record.[89]

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figured as at least one of the justifications for lump-summing." 3 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 82.72 (1952) (footnotes omitted) [hereinafter cited as 3 LARSON].

The following sources note the difference of opinion as to whether or not indebtedness is a sufficient ground for lump-sum treatment. 82 AM. JUR. 2d *Workmen's Compensation* § 654 (1976); Annot., 69 A.L.R. 547 (1930); 99 C.J.S. *Workmen's Compensation* § 343 (1958).

84. 99 C.J.S. *Workmen's Compensation* § 343 (1958) lists *Ashley* as supporting the proposition that attorney fees may be a sufficient reason for lump-summing, but payment of debt is not.

85. The court looked at the facts involving each reason, but did not determine whether each ground alone was unusual within the meaning of S.C. CODE ANN. § 42-9-300 (1976).

86. 266 S.C. at 249, 222 S.E.2d at 762.

87. *Id.* The court figured the family's monthly finances as follows:

$252.00	periodic payment (at $63.00/week)	$600.00	deceased's monthly wage
(84.00)	attorneys' fee (one-third of award)	(508.00)	gross monthly income
$168.00		$ 92.00	change in position
340.00	Social Security benefits		
$508.00	gross monthy income		
(121.00)	loan payments		
$387.00	net monthly income		

88. 266 S.C. at 250, 222 S.E.2d at 762 (quoting Ashley v. Ware Shoals Mfg. Co., 210 S.C. at 288, 42 S.E.2d at 396).

89. 266 S.C. at 250, 222 S.E.2d at 762. In Brief of Appellant at 7, counsel for the Commission had attacked this alleged justification on two grounds: (1) The proposal was

The court also rejected her fifth basis, the allegation that she could not be assured of receiving the payment of the entire award if her application was denied because the defendant was a small, self-insured company.[90] Nothing in the record indicated that the defendant was in danger of insolvency; the record showed that the defendant fully complied with section 42-5-20, regulating self-insurance by a business concern.[91] Had the court allowed conversion to a lump-sum award, it would have undermined both the requirement for unusualness in section 42-9-300 and the provision for self-insurance in section 42-5-20: "If the present facts constitute grounds for commutation of payments then every employee of a self-insured employer would be entitled to have benefits paid in a lump-sum unless financial guarantee could be given equivalent to federal insurance."[92]

Even had the court found this to be an unusual case within the meaning of section 42-9-300, Mrs. Woods's claim would not have been successful because the court did not believe a lump-sum award to be in the best interest of the dependents. The court feared that relief afforded by the elimination of monetary pressures on the family would be "temporary only, bringing about greater economic trouble in the future."[93] As Professor Larson has noted in his treatise:

> [I]f one assumes that the purpose of periodic income benefits is to provide needed ongoing support to a disabled worker, one can only wonder whether the claimant's current hardship—at a time when periodic payments were being received—might not be as nothing when compared with the hardship he would face later with both his lump sum and his periodic payments gone.[95]

B. Continuing Medical Expenses

In accordance with its decision in *Williams v. Boyle Con-*

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not sound because plaintiff lacked investment experience; and (2) the proposal "disregards the fact that the primary purpose and general scheme of Workmen's Compensation Law is to pay compensation at intervals corresponding to the time the employee would have received his wages had he not been injured."

90. 266 S.C. at 250, 222 S.E.2d at 762.

91. *Id.* S.C. CODE ANN. § 42-5-20 (1976) provides: "In the case of self-insurers, the Commission shall require the deposit of an acceptable security, indemnity or bond to secure the payment of the compensation liabilities as they are incurred."

93. 266 S.C. at 250, 222 S.E.2d at 762.

94. *Id.*

95. 3 LARSON § 82.72 (1952).

struction Co.[96] and *Dykes v. Daniel Construction Co.*,[97] the supreme court in *Rice v. Froehling & Robertson, Inc.*,[98] has reaffirmed its position that an employer is liable beyond the statutory ten week period for medical expenses that will tend to lessen the time in which the injured employee is unable to earn wages comparable to those he was receiving at the time of his injury.

In September 1966, a compensable accident left plaintiff a quadriplegic. Although Rice's maximum income compensation benefits ended in July 1972, Froehling & Robertson voluntarily paid his medical expenses through October 1972. On July 1, 1972, Rice was admitted into the Durham Rehabilitation Center for various medical and physical therapy treatments. He was still a patient at the time of the hearing before the Industrial Commission.[99] At the center, Rice learned to do various things designed to help him become more self-sufficient such as feeding himself and "hunt and peck typing."[100] Desiring to have a career in either mathematics or statistics, he enrolled in several undergraduate courses and earned *A*'s in nearly every course.[101]

Doctors at the center recommended that Rice have two operations, which he, in turn, alleged would lessen his period of disability. First, because Rice suffered from chronic urinary infections due to the use of a catheter, doctors recommended the implantation of a bladder stimulator to control the functioning of his bladder. Second, doctors suggested the embedment of a dorsal column stimulator to reduce Rice's pain. This device would enable him to stop taking pain medication which made him drowsy and thereby interfered with his studies.[102] The Industrial Commission held Froehling & Robertson liable for the costs of the proposed operations, certain past medical expenses, and any future care Rice received at the Durham Rehabilitation Center. The lower court affirmed.[103]

Section 42-15-60 of the Workmen's Compensation Act provides that an employer is only responsible for medical expenses for ten weeks from the date of injury unless further treatment

96. 252 S.C. 387, 166 S.E.2d 550 (1969).
97. 262 S.C. 98, 202 S.E.2d 646 (1974).
98. 267 S.C. 155, 226 S.E.2d 705 (1976).
99. *Id.* at 158, 226 S.E.2d at 706.
100. Record at 3.
101. 267 S.C. at 160, 226 S.E.2d at 707.
102. *Id.* at 161-62, 226 S.E.2d at 707-08.
103. *Id.* at 158, 226 S.E.2d at 706.

"will tend to lessen the period of disability."[104] Disability, for workmen's compensation purposes, is the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment."[105] Defendant argued that the Commission's authority to order further payments of expenses ended at the time the defendant finished paying the maximum income compensation. In contending that the Commission had no jurisdiction because the relief sought exceeded that provided by law, Froehling & Robertson connected medical benefits beyond ten weeks to periods of disability, which it defined "as that period in which the employer is obligated to provide income compensation."[106] The court expressly rejected the defendant's position: "The statute does not by its terms equate an employer's liability for medical treatment to any other period of liability, for income compensation or otherwise. It specifically defines the period of disability in terms of the time period in which the employee is statutorily incapacitated."[107] Thus, an employer is liable for medical treatment that will lessen the time its employee is unable to receive those wages he was earning at the time he was injured.[108] Further, the treatment must only tend to lessen the time of disability; "treatment need not bear a direct and highly correlative relationship to economic rehabilitation."[109]

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104. S.C. CODE ANN. § 42-15-60 (1976).

105. *Id.* at § 42-1-120 (1976).

106. 267 S.C. at 159, 226 S.E.2d at 706.

> The uncontradicted evidence is that the maximum compensation payable under the law to Respondent was exhausted on July 23, 1971 . . . . Thus, as of July 23, 1971, the *maximum period* of disability for which compensation was allowed under our Workmen's Compensation Law had been reached. Since that time there has been *no period* of disability *provided under the law* which could in any way be lessened by further medical benefits.

Brief of Appellants at 8.

107. 267 S.C. at 195, 226 S.E.2d at 706. *See* Dykes v. Daniel Constr. Co., 262 S.C. 98, 202 S.E.2d 646 (1974); Williams v. Boyle Constr. Co., 252 S.C. 387, 166 S.E.2d 550 (1969).

108. *Id.;* S.C. CODE ANN. § 42-1-120 (1976).

109. 267 S.C. at 159, 226 S.E.2d at 706 (citing Williams v. Boyle Constr. Co., 252 S.C. 387, 167 S.E.2d 550 (1969)). *See also* Dykes v. Daniel Constr. Co., 262 S.C. 98, 202 S.E.2d 646 (1974).

The court, as it had previously done in *Williams,* adopted the following definition of "tend" from BLACK'S LAW DICTIONARY 1637 (4th ed. 1968): "To have a leaning; serve, contribute, or conduce in some degree or way, or have a more or less direct bearing or effect; to be directed as to any end, object or purpose; to have a tendency, conscious or unconscious, to any end, object or purpose."

The court limited its review of the evidence to two issues: "whether there is competent testimony to support a conclusion that the respondent has a reasonable expectation of regaining economic self-sufficiency *and* whether the medical treatment sought is conducive to lessening the period of disability."[110] With regard to the first issue, Froehling & Robertson argued that there was no such reasonable expectation: because Rice was a quadriplegic, he was unemployable, and thus no treatment could tend to lessen his disability. It distinguished *Williams*[111] by pointing out that there the court had emphasized the physical rehabilitation of the plaintiff paraplegic, and such rehabilitation was not possible with Rice. Emphasizing both Rice's character and educational triumphs, the court rejected defendant's contention and held that Rice did indeed have a reasonable expectation of future employability and economic self-sufficiency.[112]

With regard to the second issue set forth by the court, *i.e.*, whether the proposed medical treatment would tend to lessen the time of Rice's disability, Froehling & Robertson contended that since medical treatment could not change Rice's status as a quadriplegic, his period of disability could not be reduced.[113] The court answered this assertion as follows:

> Appellants are correct in this assertion that neither of these operations will remove the basic physical handicap respondent must overcome. Nevertheless, each is aimed at removing obstacles which presently interrupt respondent's course of training, which is designed to make him economically self sufficient. Ac-

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110. 267 S.C. at 161, 226 S.E.2d at 707.

111. In Williams v. Boyle Constr. Co., 252 S.C. at 392-93, 166 S.E.2d at 552-53, the court had observed:

> The extent to which a paraplegic can be restored to his former earning capacity admittedly depends to a large extent upon the particular individual involved. While the present claimant is somewhat handicapped by his prior educational opportunities, we cannot say under this record that there is no basis for a reasonable expectation that the period of claimant's disability will be lessened if the additional medical treatment is afforded.

112. 267 S.C. at 161, 226 S.E.2d at 707. The court remarked:

> The qualities of character he has demonstrated support the conclusion that he is capable of acquiring knowledge needed for employment in his now chosen field. He has shown extreme courage, fortitude and desire, resisted temptations for self indulgent pity, and demonstrated the intellectual capacity to attain future gainful employment in an area where his physical handicap might be of minimal significance.

113. *Id.*

cordingly, the operations are reasonably calculated as treatment which will "tend" to lessen his "disability."[114]

The defendant did succeed on its final assertion that the "Commission's order for future treatment was too general."[115] The court agreed that the order did "not give them adequate notice or enable a court to review the award; nor [did] it limit the services to those tending to limit the period of disability"[116] and remanded on this issue.[117]

III. LICENSE REVOCATION

In *South Carolina Real Estate Commission v. Boineau*,[118] the South Carolina Supreme Court ruled that a real estate broker's license may be revoked for his conduct in transactions not strictly relating to his brokerage capacity.[119] The court felt so strongly that the lower court's "clearly correct" holding was proper that it emphasized it would have dismissed the appeal "except for the fact that we are of the view that an opinion has precedential value of considerable interest to both the Commission and realtors throughout the state."[120]

The Real Estate Commission generally characterized the conduct that led to the revocation of Mr. Boineau's license as follows:

> Throughout [the] transactions the appellant's common design appears, he would issue notes and make oral promises to prevent the party he was dealing with from placing an encumbrance on the property or item. Once he had secured the property or item he would mortgage it to its maximum extent, or as in [one] transaction deplete it, so that in any instance the holder of the note or promise was left with no security.[121]

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114. *Id.* at 162, 226 S.E.2d at 708.

115. Record at 150: "[T]he defendants shall be liable for such medical costs as will hereafter be incurred by the claimant for medical services rendered by the Durham Rehabilitation Center."

116. 267 S.C. at 162, 226 S.E.2d at 708. The court distinguished Dykes v. Daniel Constr. Co., 262 S.C. 98, 202 S.E.2d 646 (1974), where the scope of treatment for an injured eye was sufficiently narrow that the employer was not prejudiced by the failure to make a more definitive award.

117. 267 S.C. at 162, 226 S.E.2d at 708.

118. ___ S.C. ___, 230 S.E.2d 440 (1976).

119. *Accord*, 12 AM. JUR. 2d *Brokers* § 21 (1964) and cases cited therein.

120. ___ S.C. at ___, 230 S.E.2d at 441.

121. Brief for Respondent at 8.

The supreme court found, by the standard of "clear and convincing evidence,"[122] that the defendant's conduct in four specific transactions[123] violated both statutory and common law standards regulating the conduct of licensed brokers, even though he participated in the transactions in a personal, not professional, capacity. In reaching its decision, the court analogized the position of brokers to that of attorneys. "Even as members of the bar are subject to disciplinary procedures for conduct not strictly related to the practice of law,"[124] so are brokers subject to license revocation or suspension proceedings for conduct not strictly related to their brokerage practice. The court based its decision on three grounds: (1) Statute, (2) legislative intent, and (3) common law.[125]

Section 40-57-170 of the Code of Laws of South Carolina provides in part for revocation of a broker's license if he is found guilty of any of the following:

> (1) Making any substantial misrepresentation.
> (2) Making any false promises of a character likely to influence, persuade, or induce.
> (3) Pursuing a continued and flagrant course of misrepresentation . . . .
> (4) Any conduct in a real estate transaction which demonstrates bad faith, dishonesty, untrustworthiness or incompetency in such a manner as to endanger the interest of the public.[126]

Disregarding counsel's arguments that this statute should be strictly construed,[127] the court approvingly noted and adopted the Florida Supreme Court's discussion of a similar situation:

> "[I]t would be ludicrous to construe the statutes to mean that a broker to be answerable to the Real Estate Commission must commit the unlawful acts when engaged in real estate negotiations but should he commit the same unlawful acts when not

122. ___ S.C. at ___, 230 S.E.2d at 442. Although the court found clear and convincing evidence, it left open the question of whether that or a preponderance is the proper burden. *Id.*

123. *Id.* at ___, 230 S.E.2d at 441.

124. *Id.* at ___, 230 S.E.2d at 442. *See* ABA Formal Opinion 336 in 60 A.B.A.J. 859 (1974).

125. ___ S.C. at ___, 230 S.E.2d at 440-42.

126. S.C. CODE ANN. § 40-57-170 (1976).

127. Brief for Appellant at 13.

engaged in real estate negotiations he would still be of good character and beyond the Commission's jurisdiction."[128]

By further relying on section 40-57-110,[129] which requires "proof of honesty, integrity, truthfulness and good reputation of any applicant for a license,"[130] the court decried the utilization of a more lenient standard for disciplinary proceedings than is employed in licensing proceedings. "It does not logically follow that an initial applicant should be required to possess higher moral standards than an experienced real estate broker."[131]

The court also considered the legislative intent behind the statutes, *i.e.*, it deliberated whether or not one of the purposes for the enactment of the statutory scheme was to outlaw the type of conduct in which Mr. Boineau had engaged and decided affirmatively. In making such an evaluation of legislative intent, a court must ask itself the following question: "Do the facts show a lack of good character, competency and integrity on the part of the licensee, or rather, an impairment of these factors to such an extent as to create a possibility of the very mischief which the licensing legislation seeks to avoid?"[132] There is a valid governmental purpose for requiring a broker to possess these characteristics of honesty and integrity: "[I]n the interest of the public welfare, incompetent, unworthy and unscrupulous persons [should] be excluded from the real estate brokerage business."[133]

In addition to the above grounds for the court's decision, "it is generally held that a showing of dishonesty is a ground for revocation or suspension of a real estate broker's license, whether or not there is a statute specifically so providing."[134] This precept applies to disciplinary proceedings against an attorney as well.[135]

Although not mentioned as such, probably the most compel-

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128. ___ S.C. at ___, 230 S.E.2d at 442 (quoting McKnight v. Florida Real Estate Comm'n, 202 So. 2d 199, 200 (Fla. App. 1967).

129. S.C. CODE ANN. § 40-57-170 (1976).

130. *Id.*

131. ___ S.C. at ___, 230 S.E.2d at 442. *Accord,* Division of the New Jersey Real Estate Comm'n v. Ponsi, 39 N.J. Super. 526, 121 A.2d 555 (1956).

132. ___ S.C. at ___, 230 S.E.2d at 442 (quoting 51 AM. JUR. 2d *Licenses and Permits* § 58 (1970)).

133. Division of the New Jersey Real Estate Comm'n v. Ponsi, 39 N.J. Super. 526, 121 A.2d 555 (1956).

134. ___ S.C. at ___, 230 S.E.2d at 442 (citing 12 AM. JUR. 2d *Brokers* § 19 (1963) and cases cited therein).

135. CODE OF PROFESSIONAL RESPONSIBILITY, DR 1-102. *See also In re* Cauthen, 267 S.C. 448, 229 S.E.2d 340 (1976).

ling justification for the holding in this case was the court's concern for the welfare of the public. As has been previously noted:

> The real estate business has become a highly specialized one and the real estate broker is now the confidant of the public in much the same manner as the lawyer and the banker. His relation to the public exacts the highest degree of trust and confidence and the law imposes on [the broker] the duty of enforcing its standards.[136]

Because of the court's great concern for protecting the public from the unscrupulous, this decision may have far-reaching consequences. It is quite conceivable that its tenets may be applied to a broader class of state licensees.

Margaret Elizabeth Chastain

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136. Ahern v. Florida Real Estate Comm'n, 149 Fla. 706, 6 So.2d 857 (1942).